



## U.S. Equal Employment Opportunity Commission

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# Enforcement Guidance: Compensatory and Punitive Damages Available under sec 102 of the CRA of 1991

This guidance document was issued upon approval by vote of the U.S. Equal Employment Opportunity Commission.

**OLC Control Number:** EEOC-CVG-1992-3

**Concise Display Name:** Enforcement Guidance: Compensatory and Punitive Damages Available under sec 102 of the CRA of 1991

**Issue Date:** 07-14-1992

**General Topics:** Remedies

**Summary:** This document addresses the availability of compensatory and punitive damages pursuant to the Civil Rights Act of 1991 (42 USC § 1981A).

**Citation:** Sec 102

**Document Applicant:** Employers, Employees, Applicants, Attorneys and Practitioners, EEOC Staff

**Previous Revision:** No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

1. **SUBJECT:** Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991.
2. **PURPOSE:** This enforcement guidance sets forth the Commission's position on the availability of compensatory and punitive damages pursuant to the Civil Rights Act of 1991, § 102, "Damages in Cases of Intentional Discrimination."
3. **EFFECTIVE DATE:** July 14, 1992.
4. **EXPIRATION DATE:** As an exception to EEOC Order 12812, Appendix B, Attachment 4, § a(5), this Notice remains in effect until rescinded or superseded.
5. **ORIGINATOR:** Title VII/EPA Division, Office of Enforcement of Laws and Regulations.
6. **INSTRUCTIONS:** File at end of Compliance Manual, Policy or Enforcement Guidance.
7. **SUBJECT MATTER:**

This enforcement guidance sets forth the Commission's position on how to assess compensatory and punitive damages under § 102 of the Civil Rights Act of 1991, 105 Stat 1071, Pub. L. No. 102-166 (hereinafter referred to as § 1981A).

## I. RIGHT TO RECOVERY

Section 1981A(a)(1) provides that a complainant may recover compensatory and punitive damages against a respondent who has engaged in unlawful intentional discrimination in violation of Title VII of the Civil Rights Act of 1964, § 2000e et seq., unless that complaining party can show that the discrimination was not intentional under 42 U.S.C. § 1981. Only race discrimination claims may be brought under § 1981.<sup>4</sup>

Damages are available in addition to any relief available under § 706(g) of Title VII.<sup>5</sup> Therefore, § 1981A does not affect the right to backpay, frontpay, or any other relief already recoverable under Title VII. Damages are available only in cases of intentional discrimination and are therefore not available where the charge alleges that neutral employment practices have an adverse impact. Section 1981A(a)(1) provides that damages are available only if the complainant "cannot recover under Title VII."

As indicated above, § 1981A(a) provides for damages only if the complainant "cannot recover under Title VII," if the complaining party "cannot recover under Title VII." For purposes of the Commission's administrative enforcement process, the question arises as to the meaning of the "cannot recover" language. The Commission has no jurisdiction over § 1981, nor will the Commission, through the investigation and conciliation process, be able to determine the scope or outcome of a § 1981 action brought by the complaining party. Thus, in processing charges, the Commission cannot seek compensatory and punitive damages, as appropriate, if the complainant or not an individual may have a cause of action under § 1981.

This interpretation is supported by the Sponsor's Interpretative Memorandum, 137 Cong. Rec. S15,484 (Oct. 30, 1991), which explains that the purpose of the "recover" language was "to assure that a complaining party need not obtain duplicative damage awards against a single defendant under both section 1981 and section 1981A ... [and] a complaining party need not prove that he or she does have a cause of action under section 1981 in order to recover under the section 1981A action." In addition, the Interpretative Memorandum of Representative Edwards, co-sponsor of the bill (Sponsor of the bill) and Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, responsible for HR-1, asserts that "if a party has a cause of action under Section [1981], but for whatever reason does not bring it, that party 'cannot recover under [1981]'..., and hence can recover under § 1981A. 'The party is under no obligation to proceed under one or the other or to waive any cause of action under either statute as a condition of proceeding.'" 137 Cong. Rec. H9527 (dated Oct. 30, 1991).

Therefore, at least, for purposes of charge pending before the Commission will seek damages where otherwise appropriate if the complaining party has an ongoing § 1981 court action as long as the complaining party has not recovered under section 1981. Because the Commission has no enforcement authority under § 1981, its decisions concerning appropriate relief must rest on contingencies that may, or may not, occur under section 1981. Any other interpretation would prevent the Commission from being able to settle race discrimination claims, to the detriment of complaining parties and respondents.

Section 1981A(a)(2) provides the same remedies for intentional violations of the federal employee provisions of the Rehabilitation Act of 1973, 29 U.S.C. § 791, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5.

the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq. However, damages are not available in discrimination cases which involve reasonable accommodation if the respondent "demonstrates good faith efforts, in consultation with the person with a disability," to provide a reasonable accommodation. Section 1981A(a)(3). For example, as a respondent consulted with a sight impaired applicant to determine whether any reasonable accommodations exist to enable the applicant to perform this particular job. The applicant advised the respondent that a scanner would reasonably accommodate the applicant. The scanner is very expensive and the respondent believed that a magnifier, backed up by the office secretary as a part-time reader, would reasonably accommodate the applicant. The respondent subsequently files a charge and the Commission concludes that under the particular circumstances of that job, the magnifier plus part-time reader was not an effective reasonable accommodation. Thus, the Commission concludes that the respondent failed to provide a reasonable accommodation and is liable for discrimination. While the respondent will be liable for backpay and reinstatement, as appropriate, the Commission cannot seek compensatory or punitive damages in this case. The respondent consulted with the complaining party and expressed a good faith belief that it had provided a reasonable accommodation.

Finally, damages may not be available in certain cases where the employer acted with both legitimate and unlawful motives (mixed motives). Section 107(b) (to be codified at 706(g)(2)(B) of Title VII). See EEOC Enforcement Guidance N915.002, "Recent Developments in Disparate Treatment," July 14, 1992, for a full discussion of this issue.

## II. TYPES AND EXTENT OF RECOVERY

Section 1981A(b) sets limitations on certain damages that complaining parties may recover. First, it specifies

punitive damages are available only if the complainant demonstrates that the respondent engaged in discrimination with malice or reckless indifference to the federally protected rights of an aggrieved individual." It also provides that damages are not available against a governmental or political subdivision.

Second, § 1981A(b) reiterates that compensatory damages do not include any relief authorized under § 706(g)(2)(B)(VII). Third, it provides a limitation on the sum of compensatory damages and compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." The limitation on the amount of damages (caps) is based on the size of the respondent (number of employees)<sup>6</sup> of the respondent. The limitations are as follows:

15 to 100 employees	:
101 to 200 employees	:
201 to 500 employees	:
501 employees or more	:

The limitations do not, on their face, apply to respondents that have fewer than fifteen employees, although labor organizations and employment agencies with fewer than fifteen employees are also subject to Title VII.<sup>7</sup> Thus, a literal interpretation of the provision would potentially subject them to unlimited damages. Such an interpretation would be inconsistent with the legislative intent to spare small respondents from large damage awards. The provision could also be read to mean that labor organizations and employment agencies with fewer than fifteen employees are not subject to any damages. The Commission rejects both interpretations and concludes that all covered employment agencies and labor organizations with 100 or fewer employees are subject to the \$50,000 cap on damages.

When the Commission, or an individual, is pursuing on behalf of more than one person, the damage caps are applied to each aggrieved individual. For example, if the Commission files suit on behalf of ten complaining parties against an employer who has 1000 employees, each complaining party may receive (to the extent appropriate) up to the respondent's total liability for all ten complaining parties, but not more than \$3,000,000.<sup>8</sup>

Because relief recoverable under § 706(g) is not to be compensatory damages, complaining parties may not receive compensation for back pay, interest on backpay, front pay, or relief that would have been available under Title V of the Rehabilitation Act, or the ADA, without including such relief in the caps. Although some may contend that front pay is a "pecuniary loss" to be included in the caps, the Commission disagrees. Front pay is a type of "relief authorized under VII" and, therefore, is excluded from the definition of compensatory damages and is not included in the caps.

Past pecuniary losses are also not included in the caps. They are fully compensable where actual out-of-pocket losses are shown. Section 1981A(b)(3) limits only claims that cannot be quantified, i.e., future pecuniary losses, and nonpecuniary damages.

Example: Complaining Party is subjected to harassment and is subsequently demoted. As a result, she suffers from severe depression. She spends \$20,000 on psychiatric and medical bills for treatment of her depression. Her psychiatrist also testifies that her condition will require approximately two additional years of treatment. She may receive \$20,000 for the medical bills and backpay and frontpay awards, all of which are compensable and not included in the caps. She may also receive damages for the depression (nonpecuniary damages).

damages for future psychiatric bills for the years (future pecuniary losses), and punitive damages. The respondent has 35 employees. The sum of damages for the depression, future psychiatric expenses, and punitive damages cannot exceed the statutory cap of \$50,000.

#### A. Compensatory Damages

Compensatory damages are awarded to compensate a party for losses or suffering inflicted due to the act or conduct. See *Carey v. Piphus* 435 U.S. 247, 261 (1978) (purpose of damages is to "compensate persons for injury by the deprivation of constitutional rights"). Compensatory damages "may be had for any proximate consequences established with requisite certainty." 22 Am Jur 2d 100, § 45 (1965)" Compensatory damages include damages for pecuniary loss (out-of-pocket loss), future pecuniary loss, nonpecuniary loss (emotional harm). Compensatory damages are allowed against federal, state, and local government and private sector employers.

The following section sets forth the legal principles for computing compensatory and punitive damages where appropriate.

##### 1. Pecuniary Losses

Pecuniary losses include, for example, moving expenses, search expenses, medical expenses,<sup>10</sup> psychiatric expenses, physical therapy expenses, and other quantifiable expenses that are incurred as a result of the discriminatory conduct. To recover damages, the complaining party must prove that the employer's discriminatory act or conduct was the proximate cause of his loss. The critical question is whether the complaining party incurred the pecuniary losses as a result of the employer's discriminatory action or conduct.



Section 1981A distinguishes past and future pecuniary losses, in that future pecuniary losses are subject to the caps while past pecuniary losses are not. The Commission states that past pecuniary losses are out-of-pocket losses incurred prior to the date of the resolution of the damage claim by conciliation, settlement, or the conclusion of litigation. The amount to be awarded for past pecuniary losses can be proven by receipts, records, bills, cancelled checks, contracts with other individuals, or other proof of actual losses. Damages for past pecuniary losses will not normally be awarded without documentation.

Future pecuniary losses are out-of-pocket expenses not likely to occur after conciliation, settlement, or the conclusion of litigation.<sup>11</sup> As noted previously, future pecuniary losses are subject to the caps and do not include frontpay. Future pecuniary losses include the same expenses listed above, if they are likely to occur and will continue after settlement, conciliation or litigation.

The complaining party has a duty to mitigate damages. A complaining party may not recover damages for the loss that (s)he could have avoided or minimized with reasonable effort. See Restatement (Second) of Torts, § 918(1). However, the respondent has the burden of showing that the complaining party failed to exercise reasonable diligence to mitigate his/her damages. Cf., e.g., *Weaver v. Case*, 922 F.2d 1515, 1527, 55 EPD Par. 40,540 (11th Cir. 1991) (employer has the burden of showing that the plaintiff made reasonable efforts to find work to mitigate his damages when seeking backpay); *Fleming v. County of Kane*, 922 F.2d 553, 560 (7th Cir. 1990) (the burden is on the plaintiff to prove, as an affirmative defense, that the employee made reasonable efforts to mitigate damages when seeking lost wages); *Woolridge v. Industries Corp.*, 875 F.2d 540, 548, 53 EPD Par. 39,189 (9th Cir. 1989) (defendant has the burden of producing sufficient evidence to show that the plaintiff made reasonable efforts to mitigate damages when seeking lost wages).

to establish the amount of interim earnings or lack in mitigating damages on the part of the plaintiff) if the respondent can prove that the complaining party exercise reasonable diligence to mitigate his/her loss could have avoided or minimized such damages with effort, the damages may be reduced accordingly.

Example: Complaining Party is a nurse in New York which has a critical nursing shortage. CP v she rejected the sexual advances of the hospital administrator. CP has been unemployed for 6 months. She seeks recovery for past pecuniary losses. CP's losses include, among other losses, moving expenses from California and job search expenses in California. CP maintains that it was necessary to move to New York to find another nursing position. The respondent maintains that CP could have found a comparable nursing position in New York City with reasonable diligence within 2 weeks and that her New York job search expenses have been minimal. Therefore, CP's recovery for her moving expenses and job search expenses from California may be limited to the amount of expenses she would have incurred in New York. Backpay and damages sought for the other pecuniary losses incurred during her year-long unemployment reduced, since the respondent has proved that she could have found another job within a few weeks.

## 2. Nonpecuniary Losses

Damages are available for the intangible injury to emotional harm such as emotional pain, suffering, mental anguish, and loss of enjoyment of life. Other losses could include injury to professional standing, character and reputation, injury to credit standing, health, and any other nonpecuniary losses that are

result of the discriminatory conduct. Nonpecuniary emotional harm are more difficult to prove than pecuniary losses.<sup>13</sup> Emotional harm will not be presumed simply because the complaining party is a victim of discrimination.<sup>14</sup> The nature, and severity of emotional harm must be proven. Emotional harm may manifest itself, for example, as sleeplessness, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, and physical breakdown. Physical manifestations of emotional harm include ulcers, gastrointestinal disorders, hair loss, and

An award for emotional harm is warranted only if there is a sufficient causal connection between the respondent's actions and the complaining party's injury. See *Gordon v. Board of Directors of the City of Chicago*, 563 F.2d 159, 164 (5th Cir. 1977). The discriminatory conduct must be the cause of the emotional harm. The award for emotional harm will be seriously undermined if the symptoms of emotional harm preceded the discriminatory conduct. If a complaining party had preexisting emotional distress and his mental health deteriorates as a result of the discriminatory conduct, the additional harm may be attributed to the preexisting condition. The fact that the complaining party may be unusually sensitive and incur great emotional harm from discriminatory conduct will not absolve the respondent from responsibility for the greater emotional harm. *Williamson v. Handy Butler Company*, 817 F.2d 1290, 1294, 43 EPD Par. 37,178 (7th Cir. 1987) ("perhaps [plaintiff] was unusually sensitive, but it takes its victims as it finds them"). For example, in *Commission v. [Name Redacted]*, the Commission finds that the respondent is liable for sexual harassment against three female employees, one of whom was an incest victim. The incest victim incurred much greater emotional harm from the sexual harassment than did her two co-workers. The respondent is liable for the greater emotional harm because the incest victim suffered.

For charges alleging emotional harm, consider

are directly relevant to whether and to what extent caused the employee's emotional harm. For example, *Prudential Insurance Co.*, 852 F.2d 688, 690-91, 47 38,167 (2d Cir. 1988), the court found that defendant to promote the plaintiff caused him severe emotional humiliation, loss of self esteem, marital problems, drinking. However, the court considered several factors to determine whether and to what extent the emotional harm caused by the defendant or by other factors. The factors considered were that: 1) the plaintiff had not been subjected to overt racism or public humiliation; 2) upper management was aware that race was a factor in the failure to promote plaintiff, who had been offered three other less attractive positions; 3) the plaintiff had caused some of the problems and difficulties that he had with his co-workers because of clients that he would be promoted and he criticized co-workers in a newspaper article; and 4) the plaintiff sought counseling. The court found that these factors amounted to a lower amount than the plaintiff sought. In *Vance v. Telephone and Telegraph Company*, 863 F.2d 1503, 151 38,626 (11th Cir. 1989), the court found that an award of \$500,000 in compensatory damages for mental distress, harm, or humiliation resulting from racial discrimination was properly ruled excessive where there were other factors that probably contributed to the plaintiff's mental distress. The plaintiff had marital problems because her husband filed a paternity suit by another woman, financial problems resulting from an automobile accident, dietary problems, family illnesses and deaths. Therefore, where a company's emotional harm is due in part to personal circumstances which were not caused or exacerbated by the discriminatory conduct, the employer is liable only for the harm caused by the discriminatory conduct.

The Commission will typically require medical evidence of emotional harm to seek damages for such harm in connection with a discrimination claim.

negotiations. However, evidence of emotional harm is established by testimony. *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108, 1121-22, 45 EPD Par. 37,785 (3d Cir. 1987), cert. denied, 492 U.S. 905, 50 EPD Par. 39,201 (1989); *Conner v. Prudential Insurance Co.*, 852 F.2d at 690-91. The "plaintiff's own testimony may be solely sufficient to establish emotional or mental distress." *Williams v. TransWorld Airline, Inc.*, 840 F.2d 1267, 1273, 27 EPD Par. 32,174 (8th Cir. 1981). In *Blair v. Blair*, a plaintiff was awarded \$52,644.80 in damages for mental anguish and emotional distress resulting from losing his home, his marital harmony, and the respect of his children, and being discriminatorily discharged. *Muldrew v. Anheuser-Busch, Inc.*, 840 F.2d 989, 33 EPD Par. 34,187 (8th Cir. 1984). In *Blair v. Blair*, *Macy & Co., Inc.*, 712 F.2d 1241, 1245, 32 EPD Par. 32,174 (8th Cir. 1983), the plaintiff was awarded \$12,402 for "mental anguish, humiliation, embarrassment and stress," \$5,000 in backpay, and \$60,000 in punitive damages. The evidence was that the supervisor openly manifested racial bias against Blacks by making racially offensive references to them and to another employee, and customers. On one occasion, the supervisor and plaintiff got into a dispute during which the supervisor berated the plaintiff in street language in front of other employees and customers, although she never addressed White employees in this manner. The supervisor reported the dispute to management and told them that she wanted plaintiff "out of the store." Management discharged the plaintiff without asking for the plaintiff's version of the incident, although they were well aware of the supervisor's racial bias. The plaintiff testified that she was "angry and felt angry" with her supervisor after her discharge. Plaintiff further testified that she was unemployed for several months and because of her financial dilemma, she suffered from sleeplessness, anxiety, embarrassment, and depression. The court found this evidence sufficient to award damages for emotional distress.

Similarly, in *Stallworth v. Shuler*, 777 F.2d 1111 (8th Cir. 1985),

Par. 35,806 (11th Cir. 1985), a case brought under and § 1981, the court affirmed an award for \$100,000 for humiliation and emotional distress. Over a period of time, the plaintiff was consistently passed over for administrative positions and principalships for racial reasons, while qualified White persons were promoted. As a result, the plaintiff suffered emotional stress, loss of sleep, marital problems, and humiliation. The defendant stated that there was no evidence that the plaintiff missed work, received professional help, or that his relationships with students or co-workers were affected. The plaintiff countered that he was careful not to give the reason for his not being promoted to the plaintiff. The court found that the plaintiff's testimony was sufficient to award damages. However, for conciliatory settlement purposes, testimony solely by the complaining party may not be sufficient to establish emotional harm. It may be corroborating testimony by the complaining party, such as supervisors, family, friends, or anyone else with knowledge of the emotional harm.

Damage awards for emotional harm vary significantly because there are no definitive rules governing the amounts to be awarded. However, compensatory damage awards must be the sums necessary to compensate the plaintiff for the harm, even if the harm is intangible. *Carter v. Duncan-Hughes*, 727 F.2d 1225, 33 EPD Par. 34,187 (D.C. Cir. 1984). In *Handy Button Machine Company*, 817 F.2d at 1293-94, the court upheld a damage award of \$10,000 for the psychological harm of a nervous breakdown after the following sequence of events: Plaintiff was discriminated against for over a decade, assigned unskilled work, although she was qualified to perform skilled work. Plaintiff was passed over for numerous promotions, in favor of less qualified employees with less seniority. Plaintiff was also assigned to a lower status department despite her protests and the rule in the collective bargaining agreement. Finally, on one occasion, the plaintiff used an upstairs bathroom,

been assigned a locker by the company, and was loud scatological terms by a supervisor for using this bathroom. The psychiatrist characterized the bathrobe as the straw that broke the camel's back. The plaintiff was unable to return to work. In addition to the award for emotional distress, plaintiff received \$130,000 for backpay and \$10,000 for medical and psychological expenses, and punitive damages.

In comparison, in another case brought under § 1981, the plaintiff received \$123,000 for emotional distress. The plaintiff had been under stress continuously for fear of making a mistake on the job, because he was discriminatorily denied training which he needed for adequate performance. Unlike plaintiff's White coworkers, both senior and junior, plaintiff, regularly received formal training. He was given poor raises equivalent to those of his White co-workers and poor evaluations, which stressed the need for training. Plaintiff finally received training after numerous requests, but it was superficial in nature. Plaintiff's stressful situation resulted in high absenteeism and he was placed on probation. Plaintiff filed a complaint and was subsequently discharged. The psychiatrist testified that the plaintiff was suffering from anxiety, stress, and depression. The court found this to be an adequate basis for the award. Plaintiff also received \$100,000 in backpay, and \$300,000 in punitive damages. *Rowlett v. Anheuser-Busch*, 832 F.2d 194, 44 EPD Par. 37,428 (10th Cir. 1987).

The method for computing nonpecuniary damages in a conciliation or settlement should typically be based on a consideration of the severity of harm and the time the complaining party has suffered from the emotional distress. To determine the severity of the harm consider, for example, whether the harm consisted of occasional sleeplessness, or chronic insomnia resulting in years of psychotherapy. The court should find that the complaining party has suffered from the emotional distress if the evidence shows that the party has suffered from the emotional distress.



is also relevant. Of course, a complaining party who has suffered from severe depression for two months will be awarded more than a complaining party who has suffered from severe depression for a year. However, different methods of computing amounts for emotional harm may be appropriate in certain cases. Since medical evidence is important, a medical report should be obtained from the complaining party whenever emotional or physical harm is alleged.

## B. Punitive Damages

Punitive damages are awarded to punish the respondent and to deter future discriminatory conduct. They are not available against a federal, state, or local government, a government agency, or a political subdivision. Punitive damages are available only where the respondent acted with "malice or reckless indifference to the federally protected rights of an aggrieved individual." Section 1981A(b)(1).

This standard is consistent with § 1981 and therefore should be interpreted consistently.<sup>16</sup> The standard for punitive damages under § 1981 is whether the defendant acted with malice, an evil motive, or recklessness or callous indifference to a federally protected right. *Stephens v. Atlantic Cannery Co., Inc.*, 848 F.2d 484, 489, 46 EPD ¶ 13,842 (4th Cir. 1988), cert. denied, 488 U.S. 996 (1988). Under § 1983, plaintiffs may recover punitive damages "if the defendant's conduct is shown to be motivated by malice or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983); *Garza v. City of Omaha*, 814 F.2d 1072, 1077, 48 EPD ¶ 13,842 (8th Cir. 1987) (punitive damages under § 1983 "may be awarded where the defendant exhibits conscious malice, gross negligence, willful or wanton misconduct, or reckless disregard for the civil rights of the plaintiff").



# 1. Determining Malice or Reckless Dis

A "finding of liability does not of itself ent plaintiff to an award of punitive damages." *Yarbrou Oldsmobile*, 789 F.2d 508, 514, 40 EPD Par. 36,216 (1986). However, conscious, purposeful discrimination sufficient to warrant punitive damages.<sup>17</sup> As the F: has observed, "can it really be disputed that inter discriminating against a [B]lack man on the basis of color is worthy of some outrage?" *Rowlett v. Anheuser* F.2d 194, 206, 44 EPD Par. 37,428 (1st Cir. 1987). *Freedman Baking Company*, 810 F.2d 6, 42 EPD Par. 36 (1987), punitive damages were warranted for three B: plaintiffs, after two plaintiffs were fired because believed that it "just doesn't look good" for too n work in the main store. The third plaintiff compla: told that when too many Blacks get together "they c He was fired when he provided a statement to the E: other plaintiffs' behalf. The court stated that it unreasonable for the jury to view such conduct as c deserving of substantial punitive damages." *Id.* at

A number of factors may be considered to deter conduct was committed with malice or reckless indit complaining party's federally protected rights. Th: likely to have already been obtained during the lia of the investigation. The list is nonexclusive and factors may also be considered.

1. The degree of egregiousness and nature of respondent's conduct should be considered. See Rest (Second) of Torts, § 908(2). In *EEOC v. Gaddis*, 73: 1373, 1380, 34 EPD Par. 34,348 (10th Cir. 1984), th that allowance of punitive damages "involves an eva nature of the conduct in question." The respondent employment offer to the plaintiff, an out-of-state

based upon a recommendation by another employee. Plaintiff accepted the position and his name was posted on a job board as a new employee. The respondent met the plaintiff the first time when he reported for work. The respondent was upset when he discovered that the plaintiff was Black and that a Black person would never be allowed to work there. The plaintiff worked for several days and was fired. The respondent stated that no vacancy existed, although he subsequently hired two White males for the position. The court determined that this conduct warranted punitive damages.

Conduct which is shocking or offends the conscience is egregious and warrants punitive damages. For example, a supervisor often asks CP for dates and sometimes makes sexual remarks to her, although CP has repeatedly asked him to stop. The supervisor finally tells CP, who is the best person for an upcoming promotion, that if she wants the job she must have sex with him. The supervisor's conduct is considered "shocking."

2. The nature, extent, and severity of the harassment. The complaining party should be considered. The Restatement of Torts, § 908(2); *Keenan v. City of Philadelphia*, 783 F.2d 1174, 1183 (3d Cir. 1985), cert. denied, 479 U.S. 1031 (1986).

3. The duration of the discriminatory conduct. For instance, an extended period of discriminatory conduct "suggests an official policy of discrimination as opposed to the work of a renegade supervisor." *Williamson v. Handy Machine Company*, 817 F.2d at 1296. Evidence that the employer tolerated or condoned the discriminatory conduct over time could constitute malice and/or reckless indifference.

4. The existence and frequency of similar past discriminatory conduct by the respondent should be considered. For example, if there is a continuing pattern of harassment,

the respondent, it may be sufficient to find malice or indifference.

5. Evidence that the respondent planned and/or concealed or cover-up the discriminatory practices or conduct is relevant.

6. The employer's actions after it was informed of discrimination should be considered. An employer who continues discriminatory conduct and fails to take action may be liable for punitive damages. See *Yarbrough v. Tower Oldsmobile*, 514 F.2d 1417, 1425, 41 EPD Par. 36,317 (5th Cir. 1975) (punitive damages warranted where the plaintiff testified that his supervisor reprimanded him in writing, without cause, and transferred him to a less desirable work area after saying "[w]e don't want no Black guy in this shop;" the plaintiff brought his complaints of discrimination to management, who failed to respond and was "indifferent to his federally protected rights").

7. Proof of threats or deliberate retaliatory conduct against complaining parties for complaints to management or filing a charge normally will constitute malice. See *Harris v. Allis-Chalmers*, 797 F.2d 1417, 1425, 41 EPD Par. 36,317 (7th Cir. 1986) (punitive damages warranted where the defendant deliberately fired a worker for making well-founded complaints with a state FEP agency about persistent acts of racial harassment); *Erebia v. Chrysler Plastic Products Co.*, 750 F.2d 1250, 1260, 37 EPD Par. 35,317 (6th Cir. 1985) (manager's intent to hurt plaintiff economically for pursuing his complaint of harassment may constitute malice), cert. denied, 477 U.S. 901 (1986).

## 2. Calculation of Punitive Damage Amount

If malice or reckless disregard of the complainant's rights is found, respondents may be liable for punitive damages.

up to the maximum amount allowed.<sup>18</sup> Congressional : make respondents "liable for the non-wage economic of [intentional] discrimination up to the full extent stated limitations." Sponsors' Interpretative Memor Cong. Rec. S15,484 (daily ed. Oct. 30, 1991).

Of course, the punitive damage award should "k relation to the 'character of the defendant's act' 'the nature and extent of the harm to the plaintiff defendant caused.'" Rowlett v. Anheuser-Busch, 832 quoting, Restatement (Second) of Torts, § 908(2). 1 factors are discussed above on pages 15 and 16.

The financial position of the respondent is al City of Newport v. Fact Concerts, Inc., 453 U.S. 24 ("evidence of a tortfeasor's wealth is traditionall as a measure of the amount of punitive damages that awarded"); Rowlett v. Anheuser-Busch, 832 F.2d at 2 defendant may well be required to pay more than a p committed the same wrong"). The award should be cor context of the respondent's monetary resources. The punitive damages should "sting," but not "destroy" respondent. Keenan v. City of Philadelphia, 55 FEP 944-45. The following factors are relevant in deter respondent's financial position. Note, however, tha not exclusive and other relevant factors may also k

- A. The revenues and liabilities of th
- B. The fair market value of the respo assets.
- C. The amount of liquid assets on har includes amounts that they can rea borrow.

- D. The respondent's propensity to grow in the future -- projected earnings
- E. The resale value of the business, particularly useful where the business has a unique spot in the market. For instance, other companies may be seeking to buy the business.
- F. Consider whether the respondent is affiliated with, or a subsidiary of, a larger company that could provide additional financial information to the respondent.

In *Bessier v. Precise Tool & Engineering Co.*, 1509, 57 FEP Cases 1249 (W.D. Mo. 1991), the court granted discovery of defendant's financial records in a case on the issue of punitive damages. The financial records included: 1) financial statements; 2) income tax returns; 3) documents reflecting the defendant's gross income, and expenditures; 4) bank statements and deposit records; and 5) general ledgers. The defendant was also compelled to answer interrogatories as to its net worth. See also *Heller Co.*, 55 EPD Par. 40,431, 53 FEP Cases 911 (D. Or. 1991) (Plaintiff may be entitled to defendant's profit and loss statements and balance statements after making a preliminary showing of entitlement to punitive damages).

### III. CHARGE RESOLUTION

Damages are often a necessary component of full compensation where the extent that unlawful conduct occurred on or after April 4, 1991. EEOC Policy Guidance No. 915.002, "Applying the Damages Provisions of the Civil Rights Act of 1991 to Charges and Pre-Act Conduct," December 27, 1991.

Damages for past pecuniary losses should be reduced by the amount of any other compensation received by the plaintiff for the same period.

sought. Do not assume emotional harm, or automatic damages for such harm. Typically, the Commission will require medical evidence of emotional harm to seek damages in conciliation negotiations. However, in exceptional cases, a complaining party may establish emotional harm with documentation, but (s)he should have a reasonable basis for not seeking medical attention for the emotional harm.

If malice or reckless disregard of the complaining party's rights is found, the District Director and the Regional Director should be consulted, who will, in turn, consult with the Commission on a case-by-case basis.

\_\_\_\_7/14/92\_\_\_\_\_  
Date

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Evan J. Kemp, Jr.

1. Section 102 will be codified at 42 U.S.C. § 1981 rather than as part of Title VII. The text of § 1981 is attached as Appendix A.

2. The term "complaining party" means the Equal Employment Opportunity Commission, the Attorney General, or a person who brings an action or proceeding under Title VII, the Americans with Disabilities Act, or the Americans with Disabilities Act. Section 104(n) (to § 701(n) of Title VII).

3. "The term 'respondent' means an employer, employee, agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or any entity subject to section 717." Section 104(n) (to § 701(n) of Title VII).

4. 42 U.S.C. § 1981 provides a cause of action

individuals who are discriminated against on the basis of the making and enforcing of contracts. The Civil Rights Act of 1991 amends § 1981 to include all forms of racial discrimination in employment. Section 101(2)(b) of the Act provides that "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the employment relationship." Race includes, to some extent, "ethnicity." *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). Title VII of 1981 prohibits racial discrimination as well as discrimination on the basis of "ancestry or ethnic characteristics").

5. Relief under § 706(g) of Title VII has traditionally been limited to equitable relief. See, e.g., *Mitchell v. Tabor City*, 407 U.S. 313, 327 (1972) (Title VII plaintiffs are entitled to equitable relief, not to compensatory damages). Equitable relief under § 706(g) usually means backpay, reinstatement, and/or front pay. Fringe benefits and all forms of compensation are also included in backpay. EEOC "Policy Statement on Remedies and Relief in Individual Cases of Unlawful Discrimination," February 1990. Injunctions against future discriminatory conduct by the respondent may also be imposed.

6. Part-time employees are included in this coverage. EEOC Policy Guidance No. N-915-052, "Whether part-time employees are within the meaning of § 701(b) of Title VII and § 11(b) of the ADEA," April 20, 1990. Two circuits have concluded that part-time employees are not counted for jurisdictional purposes. See, e.g., *EEOC v. Garfield Associates*, 956 F.2d 842 (8th Cir. 1992) (ADEA); *Ziglar v. Allstate*, 456 U.S. 263, 270 (1982) (ADEA); *North American Signal Corp.*, 794 F.2d 347, 354, 31 F.3d 133, 486 (7th Cir. 1983) (ADEA). However, the conclusions in these cases were based on the definitional requirement that an employer have the requisite number of employees "for each week or each of twenty or more calendar weeks." Because §

1981A(b)(3) does not contain the "for each working requirement for counting employees to determine a cap, the rationale for a Garden or Zimmerman type cap appears to have been eliminated.

7. See EEOC Compliance Manual, Volume II, § 605 Appendix N. This guidance explains that both labor and employment agencies with fewer than fifteen employees covered by Title VII, if they regularly deal with 1 covered employers. Labor organizations need only open hall which procures employees for an employer or have members to be covered by Title VII. See 42 U.S.C. § 2000e(e).

Basing a union's damage caps on its number of rather than on the number of its members, may have drafting error. However, since § 1981A(b)(3) specifically refers to the number of "employees," and since that is inconsistent with the provision's purpose, the Commission interprets the statute to mean that the caps relate to the number of a union's employees, rather than to the number of

8. Section 1981A(b)(3) provides that the amount "shall not exceed [the caps] for each complaining party. Complaining party is defined as "the Equal Employment Commission, the Attorney General, or a person who brings an action under [Title VII, the ADA or the Rehabilitation Act]. Section 1981A(d) (emphasis added). Since each individual states a claim under one of these statutes is one action, each is eligible for damages up to the caps, true even when their claims are joined either in Court or private litigation brought on behalf of several individuals in a class action brought by a private party.

As a policy matter, any other construction would be inconsistent with Congressional intent to make damages available



compensate persons harmed by discrimination and to discrimination. Moreover, a contrary interpretation is at least unwieldy, if not unworkable. If the Commission awards damages on behalf of each aggrieved person in a suit, each would have to file numerous individual suits or request that each individual intervene in Commission actions.

9. The Sponsors' Interpretative Memorandum, 137 S15,484 (daily ed. Oct. 30, 1991), states that "damages may include backpay, the interest thereon, frontpay, or other relief authorized under Title VII." (emphasis added). Representative Edwards' Interpretative Memorandum, H9527 (daily ed. Nov. 7, 1991) (frontpay is relief authorized under Title VII and is excluded from damages). More generally, we find that frontpay is an available remedy under Title VII. See, e.g., *Carter v. Sedgwick County*, 929 F.2d 156, 56 EPD Par. 40,699 (10th Cir. 1991); *Weaver v. Casa Grande, Inc.*, 922 F.2d 1515, 1528, 55 EPD Par. 40,540 (11th Cir. 1991); *Edwards v. Occidental Chemical Corp.*, 892 F.2d 1442, 54 EPD Par. 39,585 (9th Cir. 1990); *Pitre v. Western Electric Co.*, 922 F.2d 1262, 127879, 46 EPD Par. 37,882 (10th Cir. 1991); *Fortino v. Quasar Company*, 950 F.2d 389, 57 EPD Par. 40,531 (1st Cir. 1991) (ADEA case questioning frontpay awards is distinguishable because "Title VII authorizes only equitable relief and frontpay resembles common law damages for breach of employment contract").

10. Although compensatory damages were not available under Title VII prior to § 1981A, medical expenses have been awarded as part of § 706(g) relief in some circumstances. See, e.g., *EEOC v. Service News Co.*, 898 F.2d 958, 59 EPD Par. 39,736 (4th Cir. 1990) (court awarded unreimbursed medical expenses, which resulted from plaintiff's loss of health insurance after she was discriminatorily discharged); *Parker Hannifan Corp.*, 747 F. Supp. 1118, 1132, 55 EPD Par. 40,531 (D.N.J. 1990) (court awarded unreimbursed medical expenses, resulting from plaintiff's loss of health insurance after she was discriminatorily discharged).

part of backpay). In such cases, medical expenses will be excluded from the caps, either as relief authorized by § 706(g) or as past pecuniary losses.

11. Congressional intent for including future pecuniary losses in the caps appears to have been to limit damages to losses that are typically difficult to quantify. If out-of-pocket losses can be shown, they can be recovered in regard to the limitations on damages. Up to the time of resolution of the complaint, whether at conciliation or the conclusion of litigation, actual out-of-pocket losses can be shown with some certainty.

12. By analogy, § 706(g) of Title VII provides that interim earnings or amounts earnable with reasonable certainty from the charging party shall operate to reduce a backpay award.

13. Cases awarding compensatory and punitive damages under other civil rights statutes will be used for guidance in analyzing the availability of damages under § 1981A. 1981 cases are particularly useful because Congress intended § 1981A damage provisions as an amendment to § 1981.

14. Complaining parties should be informed that if they suffer emotional harm, respondents may be able to obtain medical and/or psychiatric treatments for conditions resulting from the complained of symptoms. A respondent may also request information concerning the complaining party's privacy.

15. During litigation, the amount of damages will be determined by a jury if either party requests a jury. Jury trials are available if a plaintiff seeks compensatory or punitive damages under Section 1981A(c).

16. "Punitive damages are available under [§ 1981A(c)] to the same extent and under the same standards that they are available under [§ 1981(b)]."

available to plaintiffs under 42 U.S.C. § 1981. No standard may be imposed." Representative Edwards' ] Memorandum, 137 Cong. Rec. H9527 (daily ed. Nov. 7,

17. Malice is defined as "a condition of mind v person to do a wrongful act willfully, that is, on the injury of another." Black's Law Dictionary 862 (1979). Thus, discriminatory conduct "is maliciously prompted or accompanied by ill will ... either toward person individually or toward all persons in one or ... of which the injured person is a member." *Soder* Burnett County, 752 F.2d 285, 289 (7th Cir. 1985), 471 U.S. 1117 (1985).

18. The sum of punitive damages, future pecuniary nonpecuniary losses may not exceed the damage caps § 1981A(b)(3). Therefore, punitive damage awards under § 1981A typically will not be "grossly excessive" or "shocking." See *Rowlett v. Anheuser-Busch*, 832 F.2d EPD Par. 37,428 (1st Cir. 1987) (punitive damage award of \$1 million ruled grossly excessive and reduced to \$300,000); *Rowlett v. Southern Bell Telephone and Telegraph Company*, 832 F.2d EPD Par. 1516, 48 EPD Par. 38,626 (11th Cir. 1989) (punitive damage award of \$2.5 million is "high and rather shocking").

## APPENDIX A

### SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISC

The Revised Statutes are amended by inserting 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISC IN EMPLOYMENT.

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.— In an action brought by a party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited by section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2, 2000e-3), and provided that the complaining party is aggrieved under section 1977 of the Revised Statutes (42 U.S.C. 1977), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(2) DISABILITY.— In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) in section 107(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 504 of the Rehabilitation Act of 1973 or the regulations implementing section 504 concerning the provision of a reasonable accommodation, or section 508 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12188), and if the complaining party committed a violation of section 102(b)(5) of the Rehabilitation Act of 1973, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

"(3) REASONABLE ACCOMMODATION AND GOOD FAITH EFFORTS.— In cases where a discriminatory practice involves the

reasonable accommodation pursuant to section 102(b) Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act damages may not be awarded under this section where entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the court that accommodation is needed, to identify and make accommodation that would provide such individual with effective opportunity and would not cause an undue burden on the operation of the business.

"(b) COMPENSATORY AND PUNITIVE DAMAGES.—

"(1) DETERMINATION OF PUNITIVE DAMAGES.— A complainant may recover punitive damages under this section against a respondent (other than a government, government agency, or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an individual.

"(2) EXCLUSIONS FROM COMPENSATORY DAMAGES.— Compensatory damages awarded under this section shall not include interest on backpay, or any other type of relief available under section 706(g) of the Civil Rights Act of 1964.

"(3) LIMITATIONS.— The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, and enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed the sum of the amount of backpay awarded for each complaining party—

"(A) in the case of a respondent who has 100 or more employees in each of 20 or more

in the current or preceding calendar year, \$50,000;

"(B) in the case of a respondent who has and fewer than 201 employees in each of 20 or more in the current or preceding calendar year, \$100,000;

"(C) in the case of a respondent who has and fewer than 501 employees in each of 20 or more in the current or preceding calendar year, \$200,000;

"(D) in the case of a respondent who has employees in each of 20 or more calendar weeks in the preceding calendar year, \$300,000.

"(4) CONSTRUCTION.— Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) JURY TRIAL.— If a complaining party seeks compensatory or punitive damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the damages sought as described in subsection (b)(3).

"(d) DEFINITIONS.— As used in this section:

"(1) COMPLAINING PARTY.—The term 'complaining

"(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who brings an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to k  
under subsection (a)(2), the Equal Employment Oppor  
Commission, the Attorney General, a person who may  
action or proceeding under section 505(a)(1) of the  
Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)),  
who may bring an action or proceeding under title 1  
Americans with Disabilities Act of 1990 (42 U.S.C.  
seq.).

"(2) DISCRIMINATORY PRACTICE.—The term 'discr:  
practice' means the discrimination described in pa  
the discrimination or the violation described in pa  
of subsection (a)."